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UK Constitutional Law Association

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Stephen Tierney: Can the Union Survive the Election?



Thursday's election leaves the Anglo-Scottish Union on the brink. A combination of the first past the post system and the crystallisation of increasingly sharp attitudinal differences between England and Scotland has produced starkly divergent political systems which are now set to clash in the House of Commons. A revitalised Conservative Party will form a government with a mandate to pursue further reductions in public spending, a radical reorientation of Britain's place in Europe, and an agenda of constitutional reform designed to enhance the legislative power of English MPs (although, with a Conservative majority in the Commons, this goal is in the short term an issue of principle rather than practical relevance). The new government will at the same time be challenged by an equally assertive block of Scottish nationalists. The SNP will claim the political legitimacy to fight austerity, demand implementation of its own constitutional priorities – Smith plus, plus, plus – to deliver radical new tax powers to the Scottish Parliament, and reserve the right to reopen the issue of independence if these powers are not ceded or if Scotland's place in Europe is, as they see it, undermined; the Brexit referendum now looms as a threat to two unions not just one.

Last November I asked if federalism for the UK was inevitable in light of the Smith Commission recommendations. Notably, federalism was also proposed by senior Conservatives in the days before the election as a possible way to save the UK. Indeed the Conservative Party has been coming round to the idea of using the constitution to bind Scots more closely to the Union, a reciprocal commitment to union providing a counter-weight to radical fiscal devolution. But now there is now another, ostensibly more attractive, option open to the new government, namely to cut Scotland adrift, handing over a raft of fiscal powers, massively reducing Barnett funding, and effectively creating a country within a country. With a majority in the Commons the Conservatives can govern for the rest of the UK, mainly England, while also drawing the sting of the 56 nationalists across the chamber whom it is hoped will be placated by extensive fiscal autonomy (i.e. responsibility) for the Scottish Parliament.

We seem now to be at a junction offering two directions: towards a UK where Scotland is treated as a separate entity in some kind of quasi-independent, confederal arrangement where its influence on the rest of the country is further marginalised, or towards a UK where devolution is reconfigured to include not only the dynamics of autonomy but also the imperative of integration. The Smith process which followed the referendum promised the devolution of more and more powers to Scotland (and, by implication, to the other devolved territories), with no attempt to set out a vision of the state as a union of peoples, far less any effort to institutionalise the union principle by way of a coherent set of central institutions to bind these peoples together. The post-referendum trajectory of devolution has always looked pathological. Now with two power blocks – an English nationalist Conservative Party and an independentist Scottish National Party – which each has an interest in a diminished role for Scotland at the centre of the state, the risk to the union is clear.

What then of federalism?

It is curious that despite nearly two decades in which the United Kingdom has devolved territorial authority so extensively and so asymmetrically, federalism has rarely been used either to describe the direction of the devolution process or as a prescriptive template for a more coherent way of structuring the state. These are of course very significant objections to both the feasibility and desirability of federalism for the UK. In terms of feasibility it is a standard trope that federalism is a bad fit for the UK firstly because England is too big. There are also other more normative objections: a federal system would bring with it a fundamental restructuring of the constitution by way of a written constitution for which there has traditionally been little appetite. This would also mean the end of parliamentary supremacy, the keystone of the British system of government. Thirdly, it would deliver new layers of government, a step which does not enjoy significant support in England. And finally, the lessons of other countries where federalism has been grafted onto a parliamentary system is that the role for the courts expands significantly, portending the juridification of Britain's traditionally 'political' constitution.

A number of these issues were addressed last week at a workshop organised by the Edinburgh Centre for Constitutional Law asking How Federal is Britain? Scholars from federal systems around the world reflected upon where the UK sits on a more or less federal scale. It was notable how many felt that the UK already has significant federal characteristics. Another feature of the discussion was the flexibility inherent in the term 'federal' itself. Federalism is in effect a balance between autonomy for sub-state territories and representation of these territories in the central organs of the state: 'self-rule' and 'shared rule'. The UK devolution system has emphasised the former and almost entirely ignored the latter. The SNP's electoral success highlights the lack of any guaranteed constitutional role for the devolved territories in decision-making at the centre of the state. As so many SNP MPs prepare to travel to London it may seem counter-intuitive today to talk of a 'representation deficit', but in effect this is what we find when we look at the constitution. Intergovernmental relations remain largely informal, there is no 'territorial' second chamber and the House of Commons operates largely on pre-1998 lines. Despite their inevitable bullishness, the new cohort of Scottish parliamentarians will find themselves effectively redundant in the Commons, a powerlessness that will mirror the lack of influence which the devolved parliaments and executives are able to exert on patterns of central decision-making.

Is a move towards federalism likely?

The prospects for federalism look far less propitious today than they would have in the case of a hung parliament with different parties holding

the balance of power along a range of possible governmental configurations. The lack of a formalised approach to shared rule is at present the biggest gap in any federal vision for Britain. In institutional terms this is not an insurmountable challenge, but the political question is, who wants it? In particular, even if there is political will in London to reform Westminster in a federal direction and strongly revamp the system of intergovernmental relations, will there be political cooperation from the SNP who will surely see Thursday's results as a stepping stone towards independence, every bit as significant as September's referendum? Why not take more powers for the Scottish Parliament when this can be achieved – Smith promised it after all – without tying Scotland to a long-term British future? Scotland's exit from the British state will become inevitable in nationalist eyes once that state has shown itself prepared to surrender any relevance it holds for Scotland.

In other words, is it already too late to forge the political will across the Union for a 'holding together' model of federalism? And let's not forget Northern Ireland where a federal solution would surely be viewed with deep suspicion for its integrative dynamics by Irish nationalists. Furthermore, can federalism be achieved at a price deemed to be worth paying in England, i.e. without imposing a fully codified constitution, without creating new layers of regional government and without abandoning parliamentary supremacy? It would seem that these challenges are in practical terms surmountable. The Canadians have a written constitution of course, but they built a federal model upon a parliamentary system of government where constitutional finality remained open-textured until 1982. New layers of government may also be avoidable; devolution has worked with deep asymmetry and this could continue through a more formalised system of intergovernmental relations. With a working majority for the Conservatives the West Lothian issue could be kept in its box and even reform of the House of Lords would be avoidable; again Canadian federalism functions without a 'territorial' second chamber. I believe parliamentary supremacy can also survive a federalisation of Britain as it has in relation to UK membership of the EU on a don't ask, don't tell basis. The draft Scotland clauses published in January offer a clumsy but not unworkable template for an embedded Scottish Parliament, casting the implicit challenge they offer to the kompetenz-kompetenz of the Queen in Parliament into the eternal limbo of academic debate.

The impediment to a federal future, therefore, is not in fact constitutional impossibility. Both the UK constitution and federalism as an idea for government are sufficiently flexible and adaptable to arrive at a new territorial accommodation for the UK, albeit a jerry-built federal system, uniquely British in its anachronism. The real obstacle is that such a solution does not appear to be in the political interests of either of the two solitudes which 'won' the election. Federalism could work for Britain, indeed it may be the only constitutional system which can now hold the country together, but the irony is that two rival political forces will now face off at Westminster neither of which is likely to think it worth the candle.

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3 comments on "Stephen Tierney: Can the Union Survive the Election?"

[kininvie](#)

May 9, 2015



The problem you don't address here are the two conflicting ideas of sovereignty: 'Queen in Parliament' and 'Sovereignty of the Scottish people.' In Scotland, the latter is not an arcane academic concept, but a working political reality – as asserted over and over again by the SNP leadership both inside and outside Holyrood. It is an idea which cannot be, and won't be, simply abandoned for the sake of some kind of commitment to an integrating federalism.

Federalism is a dead duck, and there's no long-term point to the upheaval it would involve, as you recognise. Leave the union as it is, until such time as Scotland (or Wales, or NI) decide they wish to leave it. Prepare the ground instead for a Confederation of sovereign British nations – that will ultimately be the most comfortable and most stable solution. Also perhaps the only workable one.

[Reply](#)

O. Nanan

May 10, 2015



Accurate assessment. Quite enlightening.

[Reply](#)

carol Harlow

May 10, 2015



This is a very interesting post because, unlike most of the election, it takes the problems squarely on board. I am interested particularly in the difficulties that may arise for Scotland in being represented at Westminster and in negotiations by a party with whose key policy not all its voters apparently support. But is that new in the broad coalitions of British politics?

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